DATUK ERIC TAYLOR

v.

LIM FOO YONG & SONS REALTY SDN. BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 02-77-89]
4 DECEMBER 1989

CONTRACT: *Damages - Suit by administratrix of the deceased estate - Sale and purchase - Undertaking and failure to release pledge - Suffered damages - Whether damages suffered by party to the said contract - Whether loss suffered by the deceased or his estate.*

This is an appeal by Lim Foo Yong & Sons Realty Sdn. Bhd. (defendant) against the decision of the learned Judge of the High Court at Kuala Lumpur which affirmed the assessment of damages by the Senior Assistant Registrar that the damages to which one Datuk Eric Taylor (plaintiff) was entitled amounted to RM181,500.

The plaintiff had entered into a contract with the defendant whereby the plaintiff agreed to buy 270,105 shares in a company called Syarikat Kresen at the price of RM45,000. In consideration of the plaintiff agreeing to sell the said shares in Syarikat Kresen to the defendant, the latter agreed and undertook to arrange for the plaintiff's title deed pledged or charged to the Bangkok Bank Ltd., to be released by the said bank on 31 August 1976 by payment to the bank of RM125,755.41. The plaintiff had performed all his obligations under the contract, the defendants paid the plaintiff RM45,000 and undertook to discharge the title deed which was in respect of a piece of land held under Lot 467, EMR 3680, Mukim of Cheras (the Cheras land).

By 31 August 1976, the defendant failed or neglected to obtain release of the charge on the Cheras land. As a result of the non-performance of the contract in discharging the title of the plaintiff's land, the administratrix of the estate of the plaintiff who later passed away, sued for damages for the loss of the sum of RM100,000 being loss suffered as a result of the forced sale of the plaintiff's matrimonial house in Kenny Hill. As a result of the defendant's failure to complete the said agreement by discharging the said land the plaintiff was compelled to sell the matrimonial house valued at RM400,000 at a forced sale value of RM300,000 and thereby suffered a loss of RM100,000 because it was not a very good time to sell residential properties. The plaintiff also sued for the loss of RM44,000 being rental payments of RM1,000 per month from 15 February 1977 to 15 October 1980 and loss of income from rental of the Cheras land amounting to RM37,500 and loss of profits for inability to deal with the land and for embarrassment and suffering.

Held:

[1] Only a party to a contract or his estate is entitled to compensation for loss or damage caused by a breach of the contract under s. 74(1) of the Contracts Act 1950. The word 'party' in the said section can only mean a party who was a signatory to the contract or his estate. In this case Datin Peggy Taylor as administratrix of the estate of her deceased husband could prove and obtain compensation for any loss suffered by the deceased or his estate but not for any loss suffered by her in her personal capacity.

[2] The loss of the sum of RM100,000 suffered as a result of the forced sale of the Kenny Hill house was a loss to Datin Peggy Taylor in her personal capacity since the Kenny Hill house belonged to her and therefore was not a loss caused to the deceased or his estate as a result of the breach of the said contract by the defendant. The loss of RM44,000 being rentals payment by Datin Peggy Taylor for a flat was also not a loss to the deceased estate. As such the plaintiff's estate was not entitled to the award of RM44,000.

[3] As regards the loss of income from rental of the Cheras land amounting to RM37,500 Datin Peggy Taylor had admitted in her evidence before the Senior Assistant Registrar that she did not make any attempt to rent out that piece of land. As such no damage or loss in this respect had been proved and that the plaintiff was not entitled to the award of the said RM37,500. The award of damages as assessed by the Senior Assistant Registrar and confirmed by the High Court did not come within the purview of s. 74(1) of the Contracts Act 1950 and therefore the appeal is allowed.

[Appeal allowed.]

Cases referred to:
Hadley v. Baxendale [1854] 9 Ex 341
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 KB 528
Koufos v. Czarnikow Ltd. [1969] 1 AC 350
Teoh Kee Keong v. Tambun Mining Co. Ltd. [1968] 1 MLJ 39

Legislation referred to:
Contracts Act 1950, s. 74(1)

For the appellant - V. Pradhan; M/s. Skrine & Co.
For the respondent - C. Abraham (R.S. Nathan with him); M/s. Shearn Delamore & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

This appeal was concerned with the assessment of damages by the Senior Assistant Registrar of the High Court, who had on 28 July 1981, assessed and certified that the damages to which one Datuk Eric Taylor (the plaintiff) was entitled amounted to RM181,500. Lim Foo Yong & Sons Realty Sdn. Bhd. (the defendant) appealed against the decision of the Senior Assistant Registrar and the learned Judge of the High Court at Kuala Lumpur, after referring to *Hadley v. Baxendale* [1854] 9 Ex. 341; *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 KB 528; and *Koufos v. Czarnikow Ltd.* [1969] 1 AC 350 and having directed himself on the law that should be applied in this case, however dismissed that appeal on 4 February 1989. The defendant was dissatisfied with the decision of the High Court and appealed to the Supreme Court on 3 March 1989.

Briefly the facts of the case were that the plaintiff had by a letter dated 24 March 1976 entered into a contract with the defendant whereby the plaintiff agreed to sell and the defendant agreed to buy 270,105 shares in a company called Syarikat Kresen at the price of RM45,000. The contract provided that in consideration of the plaintiff agreeing to sell the said shares in Syarikat Kresen to the defendant, the latter agreed and undertook to arrange for the plaintiff's title deed pledged or charged to the Bangkok Bank Ltd., Kuala Lumpur, to be released by the said bank on 31 August 1976, by payment to that bank of RM125,755.41 plus interest up to the date of such payment. The plaintiff had performed all his obligations under the contract by the delivery of the following documents to the defendant, namely;

(a) all the certificates of the said shares together with the relevant transfer forms for them;

(b) a resolution approving the sale and transfer to the defendant of the said shares and the issue of new certificates; and

(c) an up-to-date list of creditors and debtors and all other liabilities of Syarikat Kresen certified as correct.

The defendant paid the plaintiff RM45,000 and undertook to discharge the title deed, which was in respect of a piece of land held under Lot 467, EMR 3680, Mukim of Cheras (the Cheras land).

Within three weeks of the conclusion of the contract with the defendant, the plaintiff in an option letter dated 12 April 1976, offered to sell the Cheras land, concerning which the defendant had undertaken to secure the release of the title deed from the Bangkok Bank Ltd., Kuala Lumpur. The said letter of option was for a period of one month and the price offered was more than RM280,000. By 31 August 1976, the defendant failed or neglected to obtain the release of the charge on the Cheras land.

Datin Peggy Taylor, the administratrix of the estate of Datuk Eric Taylor who passed away in England on 8 August 1977, in an affidavit affirmed on 10 October 1980, gave the following particulars of the damages suffered by the plaintiff as a result of the non-performance of the said contract dated 24 march 1976, in discharging the title of the plaintiff's land:

Ascertained damages of RM181,000 the particulars of which are as follows:

(a) The loss of the sum of RM100,000 being loss suffered as a result of the forced sale of the plaintiff's matrimonial house at Kenny Hill.

(1) The said land was the only transactionable asset owned by the plaintiff other than the matrimonial house in Kenny Hill and he had intended to sell the same to overcome financial difficulties experienced by his firm brought on by tardy payments of professional fees by clients, example the defendant themselves have at this moment five (5) cases outstanding with the plaintiff for non-payment of professional fees outstanding. A copy of the said intention of sale *vide* option letter dated 12 April 1976 I annex herewith and marked "DPT1".

(2) The failure of the defendant to complete the said agreement by discharging the said land compelled the plaintiff to sell our matrimonial house in Kenny Hill as a last resort.

(3) Consequently the sale of our house was sold at a loss because it was not a very good time to sell residential properties at that material time and the plaintiff was compelled to accept a lesser price in order to make a quick sale as funds were urgently required, the particulars of which are as follows:

(i) The conservative market value at the material time of sale is (A copy of the valuation report is annexed herewith and marked "DPT2").	RM400,000
(ii) Forced sale of house in February 1977 (A copy of the sale & purchase agreement dated 2 February 1977 is annexed herewith and marked "DPT3").	RM300,000
Loss	RM100,000

(b) Loss of RM44,000 being rental payments from 15 February 1977 to 15 October 1980 and still continuing at the rate of RM1,000 per month. Two (2) copies of the tenancy agreements dated 27 July 1977 and 5 June 1979 respectively are annexed herewith and marked "DPT4" and DPT5".

(c) Loss of income from rental from the said land amounting to RM37,500 in its present agricultural state. A copy of the valuation report is annexed herewith and marked Exhibit "DPT6".

She also claimed general damages for loss of profits for inability to deal with the land and for embarrassment and suffering.

During the appeal before us Mr. V. Pradhan, Counsel for the appellant, referred to the following s. 74(1) of the Contracts Act 1950 (Revised - 1974):

74. (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

and to the following illustration (n) to that section:

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

He then referred to *Teoh Kee Keong v. Tambun Mining Co. Ltd.* [1968] 1 MLJ 39, 40 and pointed out that the Federal Court had stated in that case that s. 74(1) of the Contracts Act was the statutory enunciation of the rule in *Hadley v. Baxendale* [1854] 9 Ex. 341 which laid down the main principles as follows:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Counsel submitted that damages in this case could only relate to any loss on the sale of the Cheras land. He then stated that the loss must also be suffered by one of the parties himself or his estate and pointed out that Datin Peggy Taylor was not a party to the said contract and the Kenny Hill house belonged to her and not to her deceased husband as evidenced by the memorandum of transfer (Exhibit "P2") which was signed by her and shown on pp. 15-18 of the supplementary appeal record.

Mr. Pradhan referred to the option dated 12 April 1976, at p. 147 of the appeal record and pointed out that it had contemplated the sale of the Cheras land as charged land. He stated that there was no evidence adduced for the plaintiff to show that the Cheras land could not be sold because it was charged land and submitted that the claim for damages had not been proved. As regards the claim for loss of income from rental payments for the Cheras land, Mr. Pradhan referred to the evidence of Datin Peggy Taylor on p. 12 of the supplementary appeal record where she had admitted to the Senior Assistant Registrar that she did not make any attempt to rent out the Cheras land. Counsel therefore submitted that damages had not been proved regarding the alleged loss of income of RM37,500 in respect of the Cheras land.

Mr. Cecil Abraham, who appeared for the plaintiff in the appeal before us pointed out that there were only three heads of damages in this case. He stated that the learned Judge had directed himself correctly on the law applicable for the assessment of damages in this case

and he also conceded that charged land could be sold. But he pointed out that the plaintiff was in financial difficulties because he was unable to dispose of the Cheras land which the defendant had failed to discharge as required under the contract of 24 March 1976. Datin Peggy Taylor was compelled to sell the matrimonial home in Kenny Hill because of the immense financial worries and difficulties brought upon the plaintiff by reason of the defendant's failure to comply with the agreement of 24 March 1976. Counsel added that the damages suffered were by reason of the defendant's failure to comply with the terms of the said agreement.

We were of the view that the first issue to be considered was who were the parties to the contract of 24 March 1976, because only a party to the contract or his estate is entitled to compensation for loss or damage caused by a breach of the contract under s. 74(1) of the Contracts Act. In our judgment the word "party" in the said section can only mean a party who was a signatory to the contract or his estate. In this case Datin Peggy Taylor as administratrix of the estate of her deceased husband could prove and obtain compensation for any loss suffered by the deceased or his estate but not for any loss suffered by her in her personal capacity.

Although the Kenny Hill house was the registered property of Datin Peggy Taylor and not that of her deceased husband, it must also to be noted that the real reason for the sale of the Kenny Hill house, as admitted by her, was due to the financial difficulties experienced by the deceased's firm because of tardy payment of professional fees by clients. Therefore, apart from the fact that the loss of the sum of RM100,000 suffered as a result of the forced sale of the Kenny Hill house was a loss to Datin Peggy Taylor in her personal capacity, it was not a loss caused to the deceased or his estate as a result of the breach of the said contract by the defendant.

The next issue was that concerning the Cheras land. There could be no doubt and it was rightly conceded that the Cheras land although charged could be sold if efforts had been made to sell it. The only evidence that effort was made to sell the Cheras land was the option dated 12 April 1976 signed by Datuk Eric Taylor before death and it was an option granted for the sale of the Cheras land even before the title deed charged to the Bangkok Bank Ltd. was released. There was no other evidence to show that efforts were made by the administratrix to sell that piece of land or that she was unable to sell it because of the failure on the part of the defendant to discharge the land.

As regards the loss of income from rental of the Cheras land amounting to RM37,500 it has been pointed out by Counsel for the defendant that Datin Peggy Taylor had admitted in her evidence before the Senior Assistant Registrar that she did not make any attempt to rent out that piece of land. As such we agreed with Counsel for the defendant that no damage or loss in this respect had been proved and that the plaintiff was not entitled to the award of the said RM37,500.

Finally we must point out that the loss of RM44,000 being rental payments by Datin Peggy Taylor for a flat from 15 February 1977 to 15 October 1980, was not a loss to the deceased's estate. As such the plaintiff's estate was not entitled to the award of RM44,000. As the award of damages as assessed by the Senior Assistant Registrar and confirmed by the High Court, did not come within the purview of s. 74(1) of the Contracts Act 1950, we therefore allowed the appeal but only with costs incurred in this Court. We also ordered that the deposit be refunded to the appellant.

Also found at [1990] 1 CLJ 415